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pick and choose out of the property which has been sold. The learned pleader for the appellant referred us to the case of *Muhammad Vilayat Ali Khan v. Abdul Rab* (1). That was a case not at all in accord with the present case. The reason why the would-be pre-emptor in that suit lost his suit for pre-emption was that he had by his conduct acted in such a way as to lead the parties to the bargain to conclude that he would not be the purchaser of any portion of the property sold. We are satisfied that in the present case, and from the very first, the respondent wished to purchase the whole of the property which was for sale. Both the pleas taken in appeal fail and the appeal before us is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Knox and Mr. Justice Aikman.*

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GHULAM MUHAMMAD (DEFENDANT) v. THE HIMALAYA BANK, "LIMITED,"  
IN LIQUIDATION, THROUGH THE OFFICIAL LIQUIDATOR (PLAINTIFF).\*

*Plaint—Form of plaint in suit by Company in liquidation—Amendment Civil Procedure Code, s. 53—Act No. VI of 1882, (Indian Companies' Act), s. 144.*

*Held* that a plaint in a suit by a Bank in liquidation in which the plaintiff was described as "the Official Liquidator, Himalaya Bank, Limited, in liquidation," and which was also subscribed and verified in the same terms was not a valid plaint having regard to the terms of s. 144 of the Indian Companies' Act, 1882, and that the defect could not be cured by amendment. *In re Winterbottom* (2) referred to.

THE facts of this case sufficiently appear from the judgment of Court.

Mr. *Roshan Lal* and Mr. *J. Simeon* for appellant.

The respondent was not represented. ]

KNOX and AIKMAN JJ.—This is a first appeal from an order passed by the District Judge of Saharanpur whereby he set aside a

First Appeal No. 146 of 1894, from an order of H. Bateman, Esq., District Judge of Saharanpur, dated 10th September 1894.

(1) I. L. R., 11 All. 108.

(2) L. R. 18 Q. R. D. 446.

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decree of the Small Cause Court Judge passed in his capacity of Subordinate Judge and remanded the case for re-trial on the merits under s. 562 of the Code of Civil Procedure. The appellant was defendant in the Court of first instance and the suit brought against him was instituted, as set forth in the plaint, by the "Official Liquidator, Himalaya Bank, Limited, in liquidation, plaintiff." The plaint was also subscribed and verified in the same terms. No written statement seems to have been filed, but it appears that objection was taken by the defendant to the form of the suit on the ground that the present plaintiff had no *locus standi*, and the suit should have been instituted in the name of the Himalaya Bank. Upon this an issue was framed as to whether the suit was correct in form. The Subordinate Judge, holding that the form of the suit was wrong, dismissed the plaintiff's claim with costs. The lower appellate Court had the same question raised before it in appeal. The Court considered it to be straw-splitting to dismiss a suit because the suit was laid in the wrong form. In any case it considered that the plaint ought to have been returned for amendment or to have been amended by the Court itself under s. 53 cl. (e) of the Code of Civil Procedure. It accordingly remanded the case for re-trial and added the words—"The lower Court can amend the plaint as suggested above, if it thinks fit to do so." In our opinion the lower appellate Court was wrong in thus holding. The terms of s. 144 of the Indian Companies' Act, 1882, authorize an official liquidator with the sanction of the Court to bring or defend any suit in the name and on behalf of the company. This requirement is distinctly of a formal nature, and a substantial compliance with it is insufficient. In the very same section power is given to the official liquidator to do certain acts in his official name. When such official liquidator is acting in the name and on behalf of the company, it is the company and not the official liquidator who is plaintiff. If we were to authorize an amendment in the case before us, it would not be a mere clerical amendment; it would be the substitution of a person who up to the present moment has never been plaintiff in the suit in place of the person who did in fact sue. Moreover, in the present case it would

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be permitting a plaintiff whose suit has become barred by limitation to bring the suit so barred, and would be in contravention of the principle laid down in s. 22 of Act No. XV of 1877. The point before us was considered in *In re Winterbottom* (1). In that case Cave, J. observed :—“Although I have struggled against the conclusion, feeling as I do that the debtor has in no way been misled, as appears from his affidavit, yet I have ultimately come to the conclusion that the requirement of the law has not been complied with, and that the proceeding is a proceeding taken in the name of Nicholson, Liquidator, and not the name of the company.” So in the present case we have unwillingly come to the conclusion that the suit before us is one in which the plaintiff is the official liquidator and not the Himalaya Bank, Limited, the only person who has a right of action against the appellant.

The appeal must be allowed. We set aside the decree of the lower appellate Court and restore that of the Court of first instance. The appellant will have his costs here and in the lower appellate Court.

*Appeal decreed.*

## FULL BENCH.

*Before Sir John Edge, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.*

BHAGWAN SINGH, MINOR, UNDER THE GUARDIANSHIP OF MUSAMMAT SUGHRI KUAR (DEFENDANT) v. BHAGWAN SINGH AND OTHERS (PLAINTIFFS).\*

*Hindu law—Benares School—Adoption—Adoption by one of the regenerate classes of a mother's sister's son.*

*Held by EDGE, C. J., KNOX, BLAIR and BURKITT, JJ., (BANERJI and AIKMAN, JJ., dissenting).*

The Hindu law of the School of Benares does not prohibit an adoption amongst the three regenerate classes of a sister's son, of a daughter's son, or of a son of the sister of the mother of the adopter, and consequently the onus of proving that such an adoption is prohibited by usage is upon him who alleges that it is illegal.

\* First Appeal No. 301 of 1892, from the decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 23rd September 1892.

(1) L. R. 18 Q. B. D. 446.

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